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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1508 OF 2006
IN
SUIT NO.1301 OF 2006

Kishore R. Chhabria & Ors. ... Plaintiffs

V/s.

Vijay Mallya & Ors. ... Defendants

Mr.J.J. Bhatt with Mr.Chirag Balsara with Mr.Nikhil Mehta and Mr.H.A. Shende i/b Mulla & Mulla & CBC for Plaintiffs

Mr.Fali Nariman with Mr.Aspi Chinoy, Mr.Mustafa Doctor i/b M/s.Bachubhai Munim & Co. for Defendant Nos.1 to 6

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JULY 21, 2006**

P.C.:

. The present Motion has been taken out by the Plaintiff for several reliefs. The principal relief which is sought today by the Plaintiffs is that the Defendants be restrained from dealing with 4672791 shares comprising 49.06% equity share capital of Defendant No.2 company with a view to keep them distinct during the pendency of the suit. Although the plaintiffs have claimed other reliefs, they have no objection if the defendants exercise their right to vote and collect dividends in respect of the aforesaid shares.

The undisputed facts:

2. The Plaintiff No.1 controls the Companies

arrayed as Plaintiff Nos.2 to 10. (hereinafter referred to as Chabbria Group of companies). On 3.8.1990, the entire shareholding of Defendant No.7 (for short, hereinafter referred to as the BDA) comprising 25000 equity shares was held by Arunava Investments Limited, a subsidiary of Shaw Wallace & Co. Ltd. (SWC, Defendant No.3 herein). These shares were then transferred to a Trust known as Intrust Investments Private Limited, a nominee of Plaintiff No.1. BDA issued 75000 additional shares on 27.3.1991. These shares were allotted to Intrust Securities, Mercury Distilleries and Madanlal Dwarkadas Chabria.

On 4th May, 1992, SWC (Which was then controlled by Plaintiff No.1's brother) and Arunava Investments Limited instituted Suit No.373 of 1992 in the Calcutta High Court. The Plaintiff No.1 herein was Defendant No.1 and BDA was Defendant No.6 in that suit. The transfer of Arunava's shareholding to Intrust Investments Private Limited was challenged in that suit. A declaration was also sought that the issue and allotment of additional shares in BDA was illegal and void.

The paid up capital of BDA was then increased by issuing 75000 additional shares on 14.12.1993. Defendant No.2 (hereinafter referred to as 'Herbertsons') acquired 100000 equity shares of BDA for consideration. At the same time Plaintiff No.1 acquired 27.21% of the shares

of Herbertsons through Companies controlled by him. The paid up capital of BDA was increased and allotted to Herbertson. BDA thus became a wholly owned subsidiary of Herbertsons.

The Calcutta High Court directed impleadment of Herbertsons as party Defendant in the suit on 29.7.2004. In the course of time, the Chhabria Group of Companies had acquired further shares of Herbertsons. The Group held 4762791 shares representing 49.06% of the paid up capital of Herbertsons. The interim relief application was rejected on 27.8.1993 by the Calcutta High Court and the order was confirmed by the Supreme Court on 19.11.1993.

Soon disputes arose between Plaintiff No.1 and Defendant No.1. A suit was filed in this Court being Suit No.3910 of 1997 wherein the UB group of companies challenged the acquisition of shares in Herbertsons by the Chhabria group. Proceedings were also initiated by Defendant No.1 before the Securities Exchange Board of India, challenging the acquisition of the shares. Company Petition No.67 of 1998 was instituted by Herbertsons before the Company Law Board. The Chhabria group instituted Company Petition No.17 of 1998 under section 397 and 398 of the Companies Act before the Company Law Board in December 1998. Aggrieved by the orders of this Court in Suit No.3910 of 1997, passed by the learned Single Judge and the Division Bench in appeal, the UB

group preferred a Special Leave Petition before the Supreme Court. Several other matters pertaining to the Chhabria group and the UB group were listed together with that SLP, including the challenge to the order passed by the Securities Appellate Tribunal in similar proceedings. Plaintiff No.1 and Defendant No.1 decided to resolve the disputes pending between them and it was agreed: (i) that the Chhabria Group would sell and transfer the controlling shareholding interest in Herbertsons to Defendant No.1 and/or his nominees; (ii) that the Chhabria group would give up its claims relating to the management and control in Herbertsons; (iii) that the UB group would give up its claims relating to the management of assets and control of BDA. It was agreed that the UB group and Defendant No.1 would sell or transfer the shares held by Herbertsons in BDA to Defendant No.1 or his nominees; (iv) that Plaintiff No.1 would be exclusively entitled to the controlling shareholding interest and management control of BDA.

On 11.2.2005, consent terms were exchanged between the Chhabria group and the UB group. An escrow agreement was entered into by the parties under which 49.06% of the shares of Herbertsons and the consideration payable for these shares were to be kept in escrow till the final orders of the Supreme Court were pronounced. A written agreement was also executed between Herbertsons and the Chhabria Group regarding BDA. It was agreed that Herbertsons would sell its entire shareholding in

BDA to the latter. All other formalities were completed by the parties for effectuating the sale.

The Supreme Court accorded its sanction to the aforesaid consent terms on 7.3.2005 under which all shares of Herbertsons i.e., 49.06% of the paid-up capital equivalent to 4672791 shares would be handed over to the UB group and the Chhabria group would receive Rs.131.16 crores. On 22.3.2005, the offer price for the shares was revised. On 25.3.2005, a meeting was held between Defendant No.1 and Plaintiff No.1. However the subject matter of the discussions at that meeting are disputed, as will be seen later. The compliance report was placed before the Supreme Court on 8.4.2005 and by an order of 4.5.2005, the Supreme Court accepted and approved of the compliance report. Pursuant to these consent terms, the Company Petition No.67 of 1998 relating to BDA and Company Petition No.17 of 1999 were withdrawn. The suit pending before this Court i.e., Suit No.3910 of 1997 was also withdrawn.

The dispute:

3. According to the Plaintiffs, there was one additional term on which the parties had agreed and that is that Defendant No.1 and the UB group of companies would ensure upon acquisition of the controlling shareholding interest in SWC that SWC would give up it its claims relating to the management and control of

BDA, including those raised before the Calcutta High Court in Suit No.373 of 1992. This was agreed to at the meeting held between Plaintiff No.1 and Defendant No.1 on 25.3.2005. However this position is disputed by the Defendants. They contend that there was no such understanding regarding the Suit before the Calcutta High Court.

Submissions:

4. It is contended on behalf of the Plaintiffs that an oral agreement was arrived at between Plaintiff No.1 and Defendant No.1, wherein the parties agreed to certain terms and conditions pursuant to which 4672791 shares of Herbertsons were transferred by the Chhabria group to the UB group. One of terms of this oral understanding was that Defendant No.1 had agreed that after acquiring control of SWC, the Defendants or his Companies would withdraw the suit filed before the Calcutta High Court. The Plaintiffs have relied on the pleadings contained in paragraphs 18, 19, 20 and 22 of the plaint as well as certain paragraphs of the reply filed by Defendant No.1 to establish that there was an oral agreement between Plaintiff No.1 and Defendant No.1. A letter dated 12.4.2005 was issued by Herbertsons, at the instance of Defendant No.1, to their advocates, according to the Plaintiffs, stating therein that the UB Group had no interest in the Suit before the Calcutta High Court. The Plaintiffs contend that

Defendant No.1 secured control of SWC on 15.6.2005 and therefore, the suit filed in Calcutta High Court ought to be withdrawn. Since that has not been done by Defendant No.1 and the UB group, the plaintiffs have filed the present suit for a declaration that there was a binding and subsisting agreement under which the UB group had assured the plaintiffs that SWC would give up its claims of management of assets and control of BDA including those raised in the suit before the Calcutta High Court. The Plaintiffs have claimed specific performance of this oral agreement. In the alternative, the Plaintiffs have sought restoration of the status quo ante.

5. On behalf of the Defendants, it has been contended that the suit before the Calcutta High Court was instituted on 4.5.1992 by SWC which was then controlled by Manu Chhabria, the brother of Plaintiff No.1 herein. Plaintiff No.1 has been shown as Defendant No.1 in that suit. BDA has been impleaded as Defendant No.6 in that suit. The relief sought in the suit is a declaration that 25000 shares of BDA were transferred to Defendant No.7 in that suit i.e., to a nominee of the plaintiff No.1 herein fraudulently. Rectification of the register to reinstate the original holder of the shares and for a declaration that the issue and allotment of the 275000 additional shares in BDA was illegal are the other prayers sought. Interlocutory reliefs were denied by the Calcutta High Court. While

the suit was pending, a suit was instituted in this Court in the year 1997. The Defendants agreed that consent terms were drawn and the consent terms expressly set out various litigations which were to be withdrawn by the parties. The Suit before Calcutta High Court was not mentioned as one of those litigations which was to be withdrawn. It is therefore, pointed out that the prayers sought in the Motion would in effect amount to unravelling the Consent Terms between the parties which have the imprimatur of the Supreme Court.

6. According to the learned Counsel appearing for the Defendants, no letter was issued as contended by the Plaintiffs on 12.4.2005, authorising the advocates for the Defendants to withdraw the suit filed by SWC from the Calcutta High Court. It is contended that the letter itself was not issued by person authorised to do so. Assuming such a letter had been issued, the letter only mentions that Herbertsons was no longer interested in defending the suit. An additional written statement was filed by the Plaintiffs' group of companies on 3.6.2005 before the Calcutta High Court wherein it has been pleaded that SWC was now under the control of Defendant No.1. Even in that additional written statement there was no mention of the alleged oral agreement or understanding between Plaintiff No.1 and Defendant No.1 to withdraw the Suit before the Calcutta High Court. Nor is there any mention of the letter of 12.4.2005 which according to the plaintiffs was a letter

authorising the withdrawl of the suit. According to the Defendant, if indeed there was such an understanding between the parties, the plaintiffs ought to have brought it to the notice of the Calcutta High Court through the additional written statement filed by it.

7. Therefore, the issues which arise are: (i) whether the Plaintiffs establish that there was any oral understanding between the plaintiffs and Defendant No.1;

(ii) Whether that oral understanding related to withdrawal of the suit No.373 of 1992 before Calcutta High Court;

(iii) Whether the Plaintiffs are then entitled to the interim reliefs prayed for i.e., an injunction restraining the Defendants from extinguishing the identity of the shares transferred to them by Chhabria group pursuant to the consent terms;

(iv) for an injunction Defendant No.1 and the UB group of companies from creating third party rights in respect of those shares.

8. Clause 6 of the agreement between Herbertsons and the Plaintiffs' group of companies reads as follows:

> "A part of the settlement worked out between the parties provides for sale by the vendor to the purchaser of the vendor's entire shareholding in BDA, BDA is not a party to the proceedings pending in the Honourable Supreme Court of

> India, this part of the settlement is not included in the proposed consent terms referred to above but the sale is set out in this agreement".

The aforesaid clause 6 does not mention the suit before the Calcutta High Court. Nor do the consent terms which were filed before the Supreme Court mention the suit before the Calcutta High Court. In these circumstances, it is difficult to believe that the parties had arrived at an oral agreement under which the suit before the Calcutta High Court would be withdrawn on acquisition of control of SWC by Defendant No.1 and/or the UB group. This is moreso in view of the fact that the schedule to the consent terms filed before the Supreme Court mentions several other litigations pending in the various Courts and before various other fora between the parties which were to be withdrawn and/or settled. These litigations are in respect of BDA. The submission made on behalf of the Plaintiffs that the parties could not have mentioned the suit before the Calcutta High Court since defendant No.1 had not acquired the control of SWC cannot be accepted. The Plaintiffs were aware by March 2005 that Defendant No.1 was negotiating the acquisition of control in SWC. The parties could have always stated that the suit would be withdrawn contingent upon Defendant No.1 acquiring control of the SWC.

9. Apart from this, the UB group had published a notice on 22.3.2005 indicating its firm bid for the

purchase of the share capital of the SWC from the open market and that the UB group had entered into an arrangement for acquisition of 54.54% of the paid up capital of SWC alongwith its control/management. The plaintiffs were well aware of this published notice having been issued. Yet, the plaintiffs did not have the alleged oral understanding reduced in writing.

10. Furthermore, the additional written statement was filed on 3.6.2005 before the Calcutta High Court by Plaintiff No.1. It does not mention any oral agreement as pleaded in the present plaint. An application was filed under the new management of SWC for certain amendments to the plaint before the Calcutta High Court. In reply, Plaintiff No.1 pleaded for the first time that there were two separate agreements; one which fructified into the consent terms before the Supreme Court and the other, an alleged oral agreement arrived at between the parties on 25.3.2005.

11. Reliance is placed on the letter dated 12.4.2005 by the plaintiffs to submit that the parties in fact had acted upon this oral understanding. This is a letter issued by the Company Secretary of Herbertsons to their advocates indicating that Herbertsons had sold its shareholding and interests in BDA limited to Plaintiff No.1’s group and therefore, had no further interest in the Calcutta High Court suit. The advocates were directed to ensure that Herbertsons Limited withdrew

from the suit. This letter in my opinion, does not lend credence to the contention of the plaintiffs that there was an oral agreement. The letter is issued by Herbertsons which is a party defendant to the suit filed before the Calcutta High Court. The letter merely states that Herbertsons no longer is interested in the suit. However, that would not lead to an inference that SWC, which admittedly was not taken over by then by the Defendant No.1 and the UB group, had agreed to withdraw the suit before the Calcutta High Court.

12. Apart from this, although the Plaintiffs were aware that the Defendant No.1 was negotiating the acquisition of the controlling interest in SWC they had not recorded the alleged oral agreement in writing. The plaintiffs' version that there was an oral agreement, prima facie cannot be believed since several pleadings were filed before the Calcutta High Court by the plaintiffs after the filing of the consent terms in the Supreme Court which do not make a mention of the alleged oral agreement. In my view, therefore, prima facie, the plaintiffs have not been able to establish any oral agreement on which basis they would be entitled to any interim relief.

13. Admittedly, Defendant No.1 acquired control of the SWC on 14.6.2005. Even after that date till the filing of the present suit, there has been no letter from the plaintiffs to the defendants recording the

alleged oral agreement between themselves. Apparently, plaintiff No.1 and his group have filed the present suit since Herbertsons was to be merged with McDowell & Company Limited, Defendant No.5 herein. Admittedly, the consent terms filed before the Supreme Court have been implemented. Therefore, the question of giving any relief to the plaintiffs in this suit at the interlocutory stage does not arise.

14. In this view of the matter, the Notice of Motion is dismissed.